78-1227

In the Supreme Court of the United States

No. 78-.....

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

vs.

PERRY L. DAVIS and BURMA L. DAVIS, his wife,
Respondents.

ON PETITION FOR CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

PETITION FOR CERTIORARI

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INTRODUCTORY STATEMENT

For the convenience of the Court and in the interest of brevity the Petitioner, Ellis National Bank of Tallahassee, a National Banking corporation, will be referred to in this Petition as the Bank. The Respondents, Perry L. Davis and Burma L. Davis, his wife, will be referred to jointly as Davis.

OPINIONS AND ORDERS SOUGHT TO BE REVIEWED

This case originated in the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, and ended there in a Final Judgment dated July 11, 1977. A copy of that Final Judgment is attached to this Petition as Exhibit "A". Petitioner took a timely appeal to the District Court of Appeal of Florida, First District, which affirmed in part and reversed in part in an Opinion appearing at 359 So. 2d 466. The original Opinion is dated April 28, 1978 and rehearing was denied by separate Opinion dated June 23, 1978. A copy of the Opinion of the District Court of Appeal of Florida, First District, is attached hereto as Exhibit "B". Petitioner then filed a timely Petition for Certiorari in the Supreme Court of Florida and the Supreme Court of Florida denied Certiorari without Opinion in an Order dated Thursday, November 9, 1978, which is as yet unreported. A copy of the denial of Certiorari by the Florida Supreme Court is attached hereto as Exhibit "C". It is the final Appellate Order of the District Court of Appeal of Florida, First District, which Petitioner seeks to have reviewed in the Supreme Court of the United States of America by this Petition for Certiorari.

JURISDICTIONAL GROUNDS FOR PETITION FOR CERTIORARI

The District Court of Appeal of Florida, First District, in its Opinion at 359 So. 2d 466, directly ruled on the application of a Federal Statute to a National Bank. Specifically, the Court ruled on the interpretation of Title

12, United States Code Annotated, Section 86, and ruled that in a case in which a bank had received three installment payments of interest on a loan which were deemed to be usurious because the rate being charged was the maximum statutory rate allowed in Florida of ten per cent (10%) and the computations were based on a daily rate of interest computed by using a 360 day year rather than a 365 day year, the penalty provided by Title 12, USCA, Section 86, was repayment by the Bank to Davis of double the entire interest paid throughout the history of the loan. The District Court of Appeal of Florida, First District, concedes in its Opinion that it interprets Title 12, USCA, Section 86, differently from the only Federal decision of which counsel for the Petitioner is aware, *Cronkleton* v. *Hall*, 66 F. 2d 384 (8th Cir. 1933). Specifically, as the Court states on page 470 of its Opinion:

> "Further, we are aware that Cronkleton v. Hall, supra, which was not cited by either party but was discovered by our own research, lends a construction to the subject federal statute different from that which we have applied sub judice. However we have found no other case construing the statute in the manner as did the Cronkleton Court and that Court's construction does not appear to us to be in keeping with the plain meaning of the words of the Statute itself; nor does its reasoning comport with the interpretation given by our own Courts to our own statute which contains a similar provision." 359 So. 2d at 470, 471.

It is Petitioner's contention that jurisdiction exists in the Supreme Court of the United States to review the decision of the District Court of Appeal of Florida, First District, pursuant to Title 28, USCA, Section 1257(3), providing as follows:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

(3) By writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution, treaties, or laws of the United States, *or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or statutes of, or commission held or authority exercised under, the United States.*"

This Court has on several occasions reviewed decisions of state courts involving national banks and interpreting federal banking statutes, e.g., *Yates* v. *Jones National Bank,* (1907) 27 S. Ct. 638, 206 U.S. 158, 51 L. ed. 1002; *First National Bank of Grand Forks, North Dakota* v. *Anderson,* (1899) 19 S. Ct. 284, 172 U.S. 573, 43 L. ed. 558; *Seabury* v. *Green,* (1935) 55 S. Ct. 373, 294 U.S. 165, 79 L. ed. 834; *McCollum* v. *Hamilton National Bank of Chattanooga,* (1938) 303 U.S. 245, 82 L. ed. 819.

In *First National Bank of Lake Benton* v. *Watt,* (1902) 184 U.S. 151, 22 S. Ct. 457, 46 L. ed. 475, this Court reviewed a decision of the Supreme Court of the State of Minnesota interpreting the very statute in question in the case at bar, Title 12, USCA, Section 86. Petitioner submits that the Court clearly has jurisdiction to review the decision of the District Court of Appeal of Florida, First District, by Writ of Certiorari.

QUESTION PRESENTED FOR REVIEW

The question presented for review by the Court is the interpretation of the penalty provision of Title 12, USCA, Section 86. The District Court of Appeal of Florida, First District, has held that that Statute requires the Bank in connection with a loan which was admittedly not usurious from its inception, to pay as a penalty, not only double the payments which were found to be usurious, but double the entire interest collected throughout the period of the loan, of which only three payments were tainted with usury. The Court, in its Opinion, admits that its decision is in conflict with the only Federal decision interpreting the penalty provision of that Statute, *Cronkleton* v. *Hall,* supra.

FEDERAL STATUTE INVOLVED

The Federal Statute which was interpreted by the District Court of Appeal of Florida, First District, and under which the Bank contended that its penalty was limited to double the total interest paid on the three payments tainted by usury, is Title 12, USCA, Section 86, which reads as follows:

"Usurious interest; penalty for taking; limitations

The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by

whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same: Provided, That such action is commenced within two years from the time the usurious transaction occurred. R.S. §5198."

STATEMENT OF THE CASE AND FACTS

The Bank is the successor to The Parkway National Bank of Tallahassee, having changed its name to The Ellis National Bank when it was acquired by the Ellis National Banking Corporation, a Florida bank holding company. Parkway was founded in November of 1963 and from the time of its commencing business to the making of the loan in this case there existed a close working relationship between the Bank and The American National Bank of Jacksonville of which Perry L. Davis was a Senior Vice President. Approximately March 27, 1973, Mr. Davis by telephone requested a loan from the Bank and followed up this call with a letter request. The Bank approved the request and by letter of April 9, 1973, Davis forwarded to the Bank the note which he himself had prepared and which had then been executed by both Mr. and Mrs. Davis. Davis also sent to the Bank 930 shares of American Bank stock which was the agreed collateral for the loan. In the fifth line of the note the following words appear:

"With interest at the rate of ..... per cent per annum after date."

and up to the date of trial no figure had been inserted in that blank. Further down in the body of the note there appears line 11 which reads:

"(11) Annual Percentage Rate ~~7 1/2~~ ~~9.75~~ 10%."

The figures 7 1/2, 9.75 and 10 are written in ink as opposed to the rest of the completed blanks in the note and the first two figures, 7 1/2 and 9.75, have been lined through. It was testified at the trial of this case that the written-in figures were placed on the note by officers or employees of the bank.

Between April 12, 1973 and the time of trial, there had been a change in the structure of American Bank, which had become one of the American Banks of Florida group and accordingly, the American Bank stock had been exchanged for 7,951 shares of stock in American Banks of Florida and this was the collateral held by the Bank.

The Davis loan was set up on the Bank's books and it began to send notices to Davis for interest or principal and interest as these items fell due. The interest rate began at 7 1/2 per cent and gradually increased until it reached the statutory maximum of 10 per cent. The rate was testified to by Benson Skelton, CPA, who is the CPA for the Bank. Mr. Skelton also testified as to the method used by the Bank in computing interest which was the use of a 360-day year under the Rowlett's Tables for a time and a 365-day year beginning with the installment due September 23, 1974, and for all subsequent installments. The following table summarizes the testimony in this regard.

ELLIS NATIONAL BANK OF TALLAHASSEE

PERRY DAVIS NOTE # 17741

INTEREST		PRINCIPAL PAID	FACTOR	DAYS	RATE	AMOUNT COLLECTED	PRINCIPAL BALANCE
FROM	TO						
4/12/73	6/30/73	$ -0-	360	79	7 1/2	$1,234.38	$75,000.00
6/30/73	9/28/73	-0-	360	90	Various	1,665.11	75,000.00
9/28/73	12/31/73	-0-	360	94	10	*1,958.33	75,000.00
12/31/73	3/30/74	-0-	360	90	10	*1,875.00	75,000.00
3/30/74	4/24/74	7,500.00	360	25	10		67,500.00
4/24/74	6/25/74	-0-	360	62	10	*1,745.83	67,500.00
6/25/74	9/23/74	-0-	365	90	10	1,664.38	67,500.00
9/23/74	12/31/74	-0-	365	99	10	1,830.82	67,500.00
12/31/74	3/31/75	-0-	365	90	10	1,682.88	67,500.00
3/31/75	4/4/75	7,500.00		4	10		60,000.00
4/4/75	6/30/75	-0-	365	87	10	1,504.11	60,000.00
6/30/75	9/30/75	-0-	365	92	10	1,512.33	60,000.00
9/30/75	12/31/75	-0-	365	92	10	1,512.33	60,000.00
12/31/75	3/31/76	-0-	365	91	10	1,495.89	60,000.00
3/31/76	4/1/76	7,500.00	365	1	10		52,500.00
4/1/76	6/29/76	-0-	365	89	10	1,296.58	52,000.00
6/29/76	9/27/76	-0-	365	90	10	1,294.52	52,000.00

* The three usurious payments.

8.

Davis made all payments timely as they became due. On August 5, 1975, the Bank wrote a letter to Davis requesting that he deposit additional collateral with the Bank, the Bank being then concerned as to the value of the American Banks of Florida stock. This was followed by another letter on September 25, 1975, and on October 15, 1975, a letter from counsel for the Bank making demand that the collateral be increased. When Davis refused to deposit additional collateral the Bank brought suit on the note pursuant to the acceleration clause in the note. Davis filed his answer and defenses and a counterclaim contending that he had been charged a usurious rate of interest by reason of the three installments which were paid when the rate being charged by the Bank was 10 per cent and while the Bank was still using a 360-day year under the commonly used Rowlett's Tables.

A Pre-Trial Conference was held and a Pre-Trial Order entered. The parties also entered into a stipulation which appears verbatim in the Final Judgment entered by the Trial Court and attached hereto as Exhibit "A". The issues which were submitted to a Jury were resolved in favor of Davis and the Court thereupon, based on the Stipulation of the parties, entered the Final Judgment attached hereto as Exhibit "A".

Davis made three interest payments to the Bank when the rate being charged was 10 per cent and when the 360-day year was being used for computation. Those payments were made on December 31, 1973, March 30, 1974, and June 25, 1974, and they totaled $5,579.16. Had the Bank used the 365-day factor and the maximum rate of 10 per cent, the total of those three payments would have been $5,441.14, or a difference of $138.02. Based on that excess charge of $138.02, the District Court of Appeal of Florida, First District, in partially affirming and partially reversing

the Trial Court's Final Judgment, penalized the Bank the total sum of $47,277.86. The basis of that holding is a finding that the Bank was obligated to pay a penalty in the amount of twice the entire interest paid on the note throughout its history, in the face of uncontroverted evidence that only three of such payments were tainted by any hint of usury and when it is conceded that the loan was not usurious from its inception. It is this ruling of the District Court of Appeal which Petitioner seeks to have the United States Supreme Court review on certiorari.

ARGUMENT

The parties to this case stipulated among other things:

> "That other banks in the State of Florida have customarily and routinely used the 360-day factor applied to 365 days. That this factor is developed by the use of the 'Rowlett's Tables' which were customarily used by said banks and that such factor and tables were used when the maximum 10 per cent interest rate was being charged to borrowers from said banks."

A calendar year is, of course, composed of 365 days and the Rowlett's Tables referred to in the above stipulation are a set of tables developed by a man named Rowlett based on a mathematically simple 360-day year composed of twelve thirty day months. The purpose of the Tables was for ease of computation in the days before pocket computers and they were in use as early as 1825, the year before Florida became a State.

In the case at bar, Davis executed the note on April 12, 1973, and the Bank advanced the principal sum of $75,000.00. The blank in the note for the interest rate was not filled in but the Bank billed the first interest installment at the rate of 7 1/2 per cent using the 360-day year. The next installment which was paid on or about September 28, 1973, was computed at various different interest rates as the rate gradually inched upward. The rate charged by the Bank and paid by Davis reached the legal maximum of 10 per cent with the installment billed by the Bank and paid by Davis on December 31, 1973. That installment, as well as the installments paid on March 30, 1974, and June 25, 1974, were at the maximum rate of 10 per cent and computed using the 360-day year as described

in the Rowlett's Tables. All subsequent installments of interest were billed by the Bank and paid by Davis using a 365-day year and were not usurious. Thus, Davis paid a total of three installments on which the interest rate was slightly in excess of 10 per cent due to the use of the 360-day year. Those three payments totaled $5,579.16, and it is the Bank's contention that its only penalty, if any, under the Federal Statute involved is double that amount, or $11,158.32. The judgment of the District Court of Appeal of Florida, First District, penalizes the Bank in the sum of double the total interest paid on the note throughout of $23,638.93, or $47,277.86.

In the first place the Court's construction of the Statute is clearly erroneous. The pertinent sentence in the Statute reads as follows:

> "In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of debt, twice the amount of the interest *thus* paid from the Association taking or receiving the same . . ." [Emphasis supplied]

The word "thus" obviously refers back to "the greater rate of interest". Otherwise, the word "thus" is pure surplusage for if the Congress had intended to penalize a National Bank the entire interest paid, and not merely interest which was paid at a usurious rate, it could have simply left out the word "thus".

The Opinion of the District Court of Appeal of Florida, First District, recognizes that the construction of that Court is not in accord with the only Federal case which has ever interpreted that particular portion of the Statute. As the District Court of Appeal stated in its Opinion:

> "Further, we are aware that Cronkleton v. Hall, supra, which was not cited by either party but was discovered by our own research, lends a construction to the subject federal statute different from that which we have applied sub judice." 359 So. 2d at 470, 471.

Cronkleton v. *Hall*, (8th Cir. 1933) 66 F. 2d 384, is the only case counsel has been able to find which interprets that particular portion of the statute. That case clearly held that where the rate of interest payable to a national bank under an original loan contract is lawful or where no rate has been agreed to, the subsequent taking or receiving of interest in excess of the lawful rate, does not relate back so as to allow the right of recovery for double the amount of all prior interest payments. As headnote 9 of the case states:

> "In such case, the taking or receiving of interest in excess of legal amount would result only in forfeiture of entire interest not yet lawfully paid which was agreed to be paid or which contract carried with it, *and in right of action for recovery back of double the amount of all actual payments of interest which were in fact usurious.*" [Emphasis supplied]

The opinion in *Cronkleton* v. *Hall*, supra, concludes with the following:

> "As the Court does not find that a usurious contract was entered into between the parties in March of 1926, as the petition does not allege that the dealings between the parties were usurious in their inception, and does not allege usurious dealings before November 25, 1930, and as the findings of the Court clearly are that the usury commenced with the payment of November 25, 1930, the judgment of the District Court

is correct under the findings only as regards the payments of interest subsequent to November 25, 1930. The amount of these payments as appears by the finding was $2,183.70. The judgment is set aside, and the case is remanded to the trial court, with instructions to enter judgment for plaintiff for $4,367.40." 66 F. 2d at 388.

The holding in *Cronkleton* as applied to the case at bar would result in a penalty to be paid by the Bank in the amount of double the three interest installments paid by Davis which were usurious and no more.

Rule 19 of the Supreme Court Rules indicates one of the considerations of the Court in determining whether to grant Certiorari as follows:

> "Where a state court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

Petitioner respectfully submits that the District Court of Appeal of Florida, First District, has decided a Federal question of substance and has decided it in a manner contrary to the only reported Federal decision on the question which counsel has been able to find through diligent research. To the best of counsel's knowledge the Supreme Court has never considered the question.

There is another compelling reason why the Court should grant Certiorari in this case. As the parties have stipulated and as is common knowledge, Banks not only in Florida, but throughout the United States, have for some 150 years used the Rowlett's Tables and the 360-day year in computing interest. In today's economy when the prime rate of major New York City Banks is 11-3/4%

and the statutory maximum in most states for loans to individuals is 10%, there are surely many situations presently in existence in which banks and especially national banks, have made loans at the maximum statutory rate and using the Rowlett's Tables with the 360-day year. Thus, the decision of the District Court of Appeal of Florida, First District, if allowed to stand, could have devastating impact on national banks throughout the United States. Surely the intention of Title 12, USCA, Section 86, was not to penalize a national bank for a usurious overcharge of $138.02, the outrageous penalty of $47,277.86.

CONCLUSION

For the reasons stated above Petitioner respectfully urges the Court to grant this Petition for Writ of Certiorari and receive both briefs and oral arguments on the merits.

Respectfully submitted,

/s/ JULIUS F. PARKER, JR.
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P. O. Box 669—318 N. Monroe Street
Tallahassee, Florida 32302
(904) 222-3730
Attorneys for Petitioner, Ellis National Bank of Tallahassee

CERTIFICATE OF COUNSEL

I, JULIUS F. PARKER, JR. attorney for Ellis National Bank of Tallahassee, a National Banking corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 5th day of February, 1979, I served copies of the foregoing Petition for Certiorari on the several parties thereto as follows:

On Perry L. Davis and Burma L. Davis, his wife, by mailing a copy in a duly addressed envelope, with first class postage prepaid, to their attorneys of record as follows:

Charles L. Franson, Esquire
Bryant, Dickens, Franson and Miller
P. O. Box 5774
Jacksonville, Florida 32207

/s/ JULIUS F. PARKER, JR.
MADIGAN, PARKER, GATLIN, SWEDMARK & SKELDING
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Tallahassee, Florida 32302
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APPENDIX

EXHIBIT "A"

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA.

CASE NO.: 75-2417

ELLIS NATIONAL BANK OF TALLAHASSEE, a National Banking corporation,
Plaintiff,
vs.
PERRY L. DAVIS
and
BURMA L. DAVIS, his wife,
Defendants.

FINAL JUDGMENT

The above entitled cause came on regularly for trial pursuant to Pre-Trial Conference Order which provided as follows:

"PRE-TRIAL CONFERENCE ORDER

This cause came on before the Court for pre-trial conference and the following Pre-Trial Conference Order is hereby entered by the Court.

The following issues in this cause are to be resolved at the trial, which is scheduled by the Court for 9:00 A.M. on February 7, 1977.

1. When the Plaintiff Bank made its demand for additional collateral on September 25, 1975, did it, in good faith, believe that prospect of payment of the note or performance of Defendant's obligations were impaired?

2. Was there an agreement between the Plaintiff and the Defendants as to the interest rate which would be charged upon the note which was given by the Defendants to the Plaintiff, and if so, what was that interest rate?

3. Did the fact that the bank calculated interest for a period of time using a 360 day factor applied to 365 days constitute usury when the interest rate during those periods of time was 10 percent?

4. Do the provisions of Section 687.01— 'In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 6 percent per annum, but parties may contract for a lesser or greater rate by contract in writing' preclude submission to the jury of Issue No. 2 or was this provision waived by the conduct of the parties?

The first two questions will be submitted to the jury with instructions that the jury enter a special verdict which shall be limited to answering questions one and two. Questions three and four will be ruled upon by the Court and the parties shall submit arguments on these questions to the Court after the jury retires and briefs are filed pursuant to order of the Court.

The Plaintiff having requested permission to file an amendment to its previous answer to the Defendant's counter claim, such request was granted and such amendment shall be filed and served on Defendant's counsel by February 2, 1977. If the amendment contains additional affirmative defenses the Defendant shall respond to such affirmative defenses if they desire by Friday, February 4, 1977.

The parties shall exchange final witness lists by February 3, 1977, and additionally, parties having stated to the Court that they have agreed upon introduction of certain Exhibits without objection, a copy of these exhibits together with an agreement of counsel shall also be submitted to the Court by Friday, February 4, 1977. The parties will have three preemptory challenges for their side.

After the jury enters the special verdict and the Court rules on questions three and four, the Court will enter a Final Judgment which will merely require certain mathematical computations.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 3rd day of February, A. D. 1977.

/s/ James E. Joanos
James E. Joanos
Circuit Judge"

With respect to Issue No. 1, the jury found for the Defendants.

With respect to Issues No. 2 and 4, the Court directed a verdict for Defendants.

With respect to Issue No. 3, the parties stipulated as to the facts to be considered by the Court as follows:

"STIPULATION

With reference to Issue #3 Contained in the Pre-Trial Conference Order. Plaintiff and Defendant stipulate and agree that the following facts are correct and shall be used by the Court in determining the question:

1. Plaintiff bank calculated interest for a period of time using a 360 day factor applied to 365 days while the Defendants were charged the maximum rate of 10 per cent per annum.

2. Plaintiff had knowledge that the above factor was being used and that the factor would produce more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days.

3. That other banks in the State of Florida have customarily and routinely used the 360 day factor applied to 365 days. That this factor is developed by the use of the "Rowletts Tables" which were customarily used by said banks and that such factor and tables were used when the maximum 10 per cent interest rate was being charged to borrowers from said banks.

DATED this 8th day of February, 1977."

The Court having considered said stipulation and argument of counsel,

It is hereby ordered and adjudged as follows:

1. That Plaintiff take nothing against the Defendants.

2. That Plaintiff charged and collected a usurious rate of interest on the promissory note from September 28, 1973 through June 25, 1974 in violation of Chapter 687.03, Florida Statutes.

3. Defendants shall pay the principal balance of $52,000.00 only at $7,500.00 per year in equal annual installments as provided in said note.

4. That Defendants be and they hereby are awarded judgment against Plaintiff in the sum of $815.72, the difference between the amount of interest charged and collected by Plaintiff and the statutory rate of 6% for the period from April 12, 1973 through September 27, 1973, and in the further sum of $11,158.32, the penalty prescribed by Title 12, Section 86 U.S.C.A. for interest paid by Defendants from September 28, 1973 through June 25, 1974, and in the further sum of $15,160.28, the amount of interest paid by Defendants from June 26, 1974 through date of trial.

All for which let execution issue.

DONE and ORDERED in Chambers at Tallahassee, Leon County, Florida, this 11th day of July, A.D. 1977.

/s/ James E. Joanos
Circuit Judge

EXHIBIT "B"

ELLIS NATIONAL BANK OF TALLAHASSEE, a National Banking Corporation, Appellant,

v.

Perry L. DAVIS and Burma L. Davis, his wife, Appellee.

No. GG-397.

District Court of Appeal of Florida, First District.

April 28, 1978.

Rehearing Denied June 23, 1978.

Appeal was taken from an order of the Circuit Court, Leon County, James E. Joanos, J., entering judgment in favor of a borrower in a suit brought by a national bank on a promissory note. The District Court of Appeal, Boyer, J., held that: (1) because it was clear that the parties did not contract for a lesser or greater rate, state law fixed the interest rate on the subject note at six percent per annum; (2) the bank exacted usurious interest by charging the borrower the maximum rate of ten percent interest and calculating the interest on a 360-day year; (3) the National Bank Act furnished the exclusive remedy against the bank; (4) the borrower was entitled to recover back from the bank twice the amount of interest paid or $47,277.86, and (5) the two-year federal statute of limitations was waived because it was not raised at trial.

Affirmed in part and reversed in part.

1. Interest (Key) 31

Where it was clear that parties did not contract for lesser or greater rate of interest to be charged on promissory note, interest rate on note was fixed by statute at six percent per annum. West's F.S.A. § 687.01 et seq.

2. Usury (Key) 50

Lender violated usury laws by charging borrower maximum rate of ten percent interest and calculating interest on 360-day year. West's F.S.A. § 687.01 et seq.

3. Banks and Banking (Key) 270(1)

Where bank which was found to have charged usurious interest was national bank, statute providing that lender should forfeit double amount of interest usuriously exacted was inapplicable since bank was subject to National Bank Act which furnished exclusive remedy. West's F.S.A. § 687.04; National Bank Act, 12 U.S.C.A. § 86.

4. Banks and Banking (Key) 270(6)

Section of National Bank Act providing in first sentence that bank which has knowingly charged usurious rate of interest shall forfeit entire interest on loan transaction, and in second sentence that where usurious interest has been paid, borrower may recover back from lender twice amount of interest thus paid, must be read as furnishing separate and distinct remedies in first and second sentences thereof. National Bank Act, 12 U.S.C.A. § 86.

5. Banks and Banking (Key) 270(6)

In section of National Bank Act providing that bank's knowing exaction of usurious interest in loan transaction

"* * * shall be deemed a forfeiture of the entire interest * * *," word "forfeiture" is prospective in tense and meaning and has no application to interest already paid. National Bank Act, 12 U.S.C.A. § 86.

6. Banks and Banking (Key) 270(6)

Where parties stipulated that borrower paid interest, which was found to be usurious, in sum of $23,638.93, in connection with loan from national bank, borrower was entitled to recover back from bank twice that amount or $47,277.86. National Bank Act, 12 U.S.C.A. § 86.

7. Limitation of Actions (Key) 182(5)

Two-year statute of limitations contained in section of National Bank Act providing for borrower to recover back from national bank which has exacted usurious interest twice amount of interest so paid was inapplicable where not raised at trial in state court since statute of limitations is affirmative defense which is waived if not pleaded. National Bank Act, 12 U.S.C.A. § 86.

James C. Truett of Madigan, Parker, Gatlin, Truett, Swedmark & Skelding, Tallahassee, for appellant.

Charles J. Franson of Bryant, Franson, Miller, Olive, Brant & Ryan, Jacksonville, for appellee.

BOYER, Judge.

Ellis National Bank of Tallahassee (Bank) who was plaintiff in the trial court, appeals a final judgment in favor of appellee Davis and his wife (Davis) which has its genesis in a suit commenced by the Bank on a promissory note from Davis to the Bank.

The note was prepared by Mr. Davis, the Vice-President of a bank located in Jacksonville, executed by him and Mrs. Davis, and forwarded to the Bank in Tallahassee in March of 1973. The note secured a loan in the sum of $75,000 and was to be paid in annual installments of $7,500 each, interest to be paid quarterly. The space provided in the note for insertion of the rate of interest was left blank and the evidence from all witnesses who testified on the point was to the effect that there was no agreement between Davis and the Bank as to the rate of interest to be charged. Interest was billed quarterly by the Bank and paid by Davis. The rate charged was initially 7½ per cent per annum, then 9¾ per cent per annum and then finally 10%. In late 1975 the Bank decided that the stock which it held as security for the note had so decreased in value that a demand for additional security was made. Davis refused and the Bank accelerated payment on the note. The Bank sued seeking to have a sale of the security whereupon Davis answered alleging usury as an affirmative defense and counterclaiming against the Bank for damages in an amount equal to twice the amount of interest paid in accordance with Title XII, Section 86 U.S.C.A. In due course the trial court entered a pre-trial order setting forth the following issues to be determined: (1) When the plaintiff Bank made its demand for additional collateral on September 25, 1975, did it, in good faith, believe that prospective payment of the note or performance of defendant's obligations were impaired? (2) Was there an agreement between the plaintiff and the defendants as to the interest rate which would be charged upon the note which was given by the defendants to the plaintiff, and if so what was the interest rate? (3) Did the fact that the Bank calculated the interest for a period of time using a 360 day factor applied to 365 days constitute usury when the

interest rate during those periods of time was 10%? (4) Do the provisions of F.S. 687.01— "In all cases where interest shall accrue without a special contract for the rate thereof, the rate shall be 6% per annum, but parties may contract for a lesser or greater rate by contract in writing" preclude submission to the jury of issue number two or was this provision waived by the conduct of the parties? The jury found for Davis as to the first issue viz.: That the Bank's demand for additional collateral was not in good faith and the trial judge directed a verdict in favor of Davis as to the second and fourth issues thereby determining that there was no agreement between Davis and the Bank as to the interest rate to be charged and that F.S. 687.01 required as a matter of law that the interest accrue at the rate of 6 per cent per annum. As to the third issue relating to usury the parties stipulated that the Bank calculated the interest using a 360 day factor in accordance with Rowlett's Tables while charging Davis the maximum interest rate of 10 per cent; that the Bank knew that the factor was being used and that it would produce more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days; and that other banks in Florida customarily used the 360 day factor developed by use of Rowlett's Tables when the maximum 10 per cent interest rate was being charged to borrowers. After considering the stipulation and arguments the court found for Davis as to the third issue and that the Bank had c 'lected a usurious interest rate from September 28, 1973 through June 25, 1974. The court thereupon ordered that Davis pay the principal balance on the note without paying any interest, that Davis be awarded $815.72, the difference between the amount of interest charged and collected by the Bank over and above the statutory rate of 6 per cent; that Davis be paid the sum of $11,158.32, the penalty prescribed

by Title XII, Section 86, U.S.C.A. for interest paid by Davis from September 28, 1973 through June 25, 1974; and that Davis be paid the sum of $15,160.28, the penalty for the amount of interest paid by Davis from June 25, 1974 through the date of trial.

[1] Although, because of our treatment of appellant's second point which will be hereafter discussed, it is not necessary that we address its first point, we nevertheless note that we agree with the learned trial judge that F.S. 687.01 fixes the interest rate on the subject note at 6 per cent per annum since the evidence is clear that the parties did not contract for a lesser or greater rate.

As to appellant's second point, viz.: That the trial court erred in finding that the interest rate charged Davis by the Bank from September 28, 1973 to June 25, 1974 was usurious by virtue of computation at the maximum legal rate of 10 per cent on the basis of a 360 day year rather than the actual calendar year of 365 days, there appears to be a division of authority in other jurisdictions and no reported Florida case has apparently addressed the issue.

The parties agreed during oral argument before this court and stipulated before the trial court that we are not here concerned with "spreading": That the issue is whether the interest during the period that interest was being charged by the Bank at the rate of 10 per cent exceeded the maximum legal rate allowed by F.S. 687.03. As above stated the parties also stipulated that the Bank knowingly charged, during the subject period, interest at the rate of 10 per cent based upon a 360 day year and knew that such computation would produce more interest than would be produced by applying the maximum legal rate to a calendar year of 365 days. We are not, therefore, here involved with a case of inadvertence, oversight

or mistake and the simplest of mathematics reveals that 10 per cent of a given sum results in a greater per diem rate if computed on a basis of a 360 day year than if computed on the basis of a 365 day year. Appellant urges that the difference is "de minimis" or not material. However, we note that F.S. 687.03 affords no leeway. It provides, in material part: "It shall be usury and unlawful * * * to reserve, charge or take for any loan * * * except upon an obligation of a corporation, a rate of interest greater than 10 per cent per annum, either directly or indirectly, * * *".

In *American Timber and Trading Company* v. *The First National Bank of Oregon,* 511 F.2d 980 (1975) the United States Court of Appeals of the Ninth Circuit had occasion to consider a factually similar case involving Oregon law. Although that court carefully and specifically limited its construction to Oregon law we are of the view that its rationale is applicable in Florida. We are particularly impressed with the following statements contained in that opinion:

> "* * * The bank contends that the use of a 365/365 method creates difficult computations and, therefore, for reasons of convenience the banking community considers it proper to use the simpler 365/360 method. The district court noted that the legislative intent in enacting usury laws is to protect borrowers from paying excessive interest. The court felt the act should be construed with regard to its net effect upon the borrower rather than upon the bookkeeping burden, custom, or convenience of the lender. The court noted that the bank used the 365/365 method to compute interest it paid to its depositors. Moreover, the court doubted whether the practice could obtain legitimacy by long and heavy borrowing would the question ever

> arise. Therefore, it concluded that it could not be said that the Legislative Assembly has acquiecsed in a practical construction of the law at odds with the plain meaning of its words. Again, we agree with the district court's ruling.
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> * * *
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> "* * * Any claim by the banking industry that ease of calculation is justification for exacting higher interest is of dubious validity in this age of computer technology." (511 F.2d at pages 983 and 984)

[2] Although factually dissimilar, and involving a different specific issue, our holding sub judice is, we believe, supported by the philosophy of *Dixon* v. *Sharp,* 276 So.2d 817 (Fla.1973). We are here also in line with Attorney General Opinion 075-269 wherein the Attorney General of the State of Florida opined affirmatively to the query "Is it a violation of Chapter 687, F.S. (Interest and Usury), for a lender to calculate interest on a 360-day year, where an individual is charged the maximum rate of 10% interest?"

We accordingly affirm the trial court as to the points raised by appellant.

[3] Davis cross assigned as error the amount of the money judgment as fixed by the trial court. We find that point to merit our attention.

F.S. 687.04 provides:

> "Any person, or any agent, officer or other representative of any person, willfully violating the provisions of § 687.03 shall forfeit the entire interest so charged, or contracted to be charged or reserved, and only the actual principal sum of such usurious contract can be enforced in any court in this state, either at

> law or in equity; and when, said usurious interest is taken or reserved, or has been paid, then and in that event the person, who has taken or reserved, or has been paid, either directly or indirectly, such usurious interest, shall forfeit to the party from whom such usurious interest has been reserved, taken or exacted in any way, double the amount of interest so reserved, taken or exacted; * * *"

That statute, however, is here inapplicable because appellant is a national bank and is subject to Title XII, Section 86, U.S.C.A., which furnishes the exclusive remedy when a national bank is found guilty of exacting usurious interest. (See *Coral Gables First National Bank* v. *Constructors of Florida*, 119 So.2d 741 (Fla. 3d DCA 1960) and cases therein cited) That statute provides:

> "The taking, receiving, reserving, or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the same:"

[4] Although appearing at first blush to be clear and unambiguous, there is great confusion among the courts which have had occasion to consider its application to a specific factual situation. There is, though, one area of its construction upon which all agree, viz.: The first sentence of the statute and the second sentence thereof must be read separately as furnishing separate and distinct remedies. (See *Coral Gables First National Bank* v. *Constructors of Florida, supra; Western Union Telegraph Co.* v. *Mahone*, 120 Va. 422, 91 S.E. 157 (1917); *First National Bank of Lake Benton* v. *Watt*, 184 U.S. 151, 22 S.Ct. 457, 46 L.Ed.2d 475 (1902), and *Cronkleton* v. *Hall*, 66 F.2d 384 (8th Cir. 1933).) In considering the question of the imposition of penalties provided by the subject statute, it was stated in *Mitchell* v. *Joplin National Bank*, (1918) 204 S.W. 1125, 200 Mo.App. 243 that:

> "There are two entirely different divisions of the section. The first provides for a forfeiture when usury has been knowingly contracted for and such usury entered into the note; the second provides for the recovery back of all interest paid when said interest is in part usurious."

Our own F.S. 687.04, though not applicable to a national bank, has similar wording and has been construed similarly. (See *Purvis* v. *Frink*, 61 Fla. 712, 54 So. 862 (1911); *Lyle* v. *Winn*, 45 Fla. 419, 34 So. 158 (1903) and *Levin* v. *Fisher* (Fla. 3rd DCA 1963) 150 So.2d 730)

[5] As noted, the first sentence of the subject federal statute provides that "the taking, receiving, reserving, or charging a rate of interest greater than is allowed by [the applicable law], * * * shall be deemed a forfeiture of the entire interest which the note * * * carries with it, or which has been agreed to be paid thereon." The word "forfeiture" is prospective in tense and meaning. It has no application to that which has already been accomplished, viz.: To interest already paid. The learned trial judge was therefore correct in holding that by virtue of that provision of the statute no further interest would be required to be paid on the note because, pursuant to the wording of the statute, such interest was "forfeited" because of the usurious nature of the transaction.

We turn now to a consideration of the second sentence of the statute which, as above recited, encompasses a completely separate and distinct penalty. That provision provides that in case a usurious rate of interest has actually been *paid* the debtor may recover back from the creditor bank "twice the amount of interest thus paid". The Supreme Court of the United States in *First National Bank of Lake Benton* v. *Watt, supra,* held that although the statute is penal in character and must be strictly construed, it must nevertheless be given a construction in keeping with its "obvious intent" and that the second sentence "subjects the creditor to pay twice the amount of the entire interest illegally exacted". Our sister court of the Third District, in *Coral Gables First National Bank* v. *Constructors of Florida, supra,* considering application of the same statute, said:

> "* * * Where the interest has been *paid,* the person so paying it may *recover back twice the amount paid.* * * *" (Emphasis the Court's: 119 So.2d at page 747)

[6] Sub judice the parties have stipulated that Davis paid interest in the sum of $23,638.93. Twice that amount is $47,277.86. It is that amount, and only that amount, that Davis is entitled to recover back from the bank. That portion of the final judgment awarding money damages is therefore hereby amended accordingly.

[7] Lest it appear that we have overlooked the concluding sentence of the subject Federal Statute which contains a two year statute of limitations "from the time the usurious transaction occurred", we acknowledge that provision, but observe that its construction has no application sub judice for the reason that all authorities agree that such provision constitutes a statute of limitations which is, in Florida, an affirmative defense which is waived if not pleaded. It has not been raised sub judice.

Further, we are aware that *Cronkleton* v. *Hall, supra,* which was not cited by either party but was discovered by our own research, lends a construction to the subject Federal Statute different from that which we have applied sub judice. However, we have found no other case construing the statute in the manner as did the *Cronkleton* court and that court's construction does not appear to us to be in keeping with the plain meaning of the words of the statute itself; nor does its reasoning comport with the interpretation given by our own courts to our own statute which contains a similar provision.

AFFIRMED IN PART and REVERSED IN PART.

McCORD, C. J. and MASON, ERNEST E., Associate Judge, concur.

ON PETITION FOR REHEARING

DENIED

BOYER, Judge.

By petition for rehearing appellant urges that by our holding that its charge of an interest rate in excess of the maximum allowed by law constituted usury is in conflict with our own opinion in *North American Mortgage Investors* v. *Cape San Blas Joint Venture,* 357 So.2d 416 (Fla. 1st DCA 1978), which opinion was entered on June 17, 1977. Although that opinion was a one sentence per curiam affirmance, appellant cites us to the record in an attempt to establish conflict. Without here addressing the propriety of citing a "PCA" (see *Department of Revenue* v. *Young American Builders,* 358 So.2d 1096 (Fla. 1st DCA 1978)) we note that even the allegations of appellant's petition for rehearing does not demonstrate any conflict. *North American Mortgage Investors* v. *Cape San Blas Joint Venture, supra,* according to appellant's own

petition for rehearing, involved an unintentional overcharge. Sub judice, on the other hand, the bank *stipulated* that it knowingly employed a manner of computation which it *knew* would produce more interest than the maximum legal rate.

Appellant also urges that we overlooked the holding in *Dixon* v. *Sharp*, 276 So.2d 817 (Fla. 1973). A reading of our opinion, however, reveals that we expressly recognized, indeed relied upon, that opinion, saying:

> "Although factually dissimilar, and involving a different specific issue, our holding sub judice is, we believe, supported by the philosophy of *Dixon* v. *Sharp*, 276 So.2d 817 (Fla. 1973). * * *"

Finally, appellant contends that we have "overlooked and misconstrued the plain language of the second sentence of Title 12, United States Code Annotated, Section 86." In so urging appellant takes a position for the first time in its petition for rehearing which was never urged in its original brief at oral argument, nor in the supplemental brief which this court ordered for the specific purpose of seeking counsel's aid in the construction of that statute. We have nevertheless considered appellant's contentions and find them not to merit a revisiting of our original opinion.

The petition for rehearing is, therefore, denied.

McCORD, C. J., and MASON, ERNEST E., Associate Judge, concur.

EXHIBIT "C"

SUPREME COURT OF FLORIDA

THURSDAY, NOVEMBER 9, 1978

CASE NO. 54,698

ELLIS NATIONAL BANK OF TALLAHASSEE,
Petitioner,

v.

PERRY L. DAVIS, et ux.,
Respondents.

District Court of Appeal,
First District

GG-397

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Fla. R. App. P. 9.120, and it appearing to the Court that it is without jurisdiction, it is ordered that certiorari is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

ENGLAND, C.J., BOYD, OVERTON and ALDERMAN, JJ., concur

ADKINS, J., dissents

TC

cc: Hon. Raymond E. Rhodes, Clerk
Hon. James E. Joanos, Judge
Hon. Paul F. Hartsfield, Clerk
Julius F. Parker, Jr., Esquire
Charles J. Franson, Esquire
James C. Truett, Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ (Illegible)
Deputy Clerk